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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-775

W. WOOD PRINCE AND JAMES F. DONOVAN, AS TRUSTEES OF THE CENTRAL MANUFACTURING DISTRICT,
Plaintiffs-Respondents,

vs.

ROYAL INDEMNITY COMPANY,
Defendant-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MAY IT PLEASE THE COURT:

QUESTION PRESENTED.

Whether, under Illinois law, respondents, the named insureds in a fire insurance policy, had an insurable interest in two insured structures at the time they were destroyed by fire.

STATEMENT.

The facts in this case were stipulated (A. 20-31). They presented only the narrow question of Illinois law stated above.

Respondents contracted to sell 69 parcels of real estate. As part of the transaction, respondents executed assignments of fire insurance policies, including two parcels, referred to as the "A&P properties," which were included in a policy which had previously been issued to respondents by the petitioner. At a closing involving the A&P properties respondents agreed with the buyer to forward the assignments of the outstanding fire insurance coverage to the insurers and to obtain consent to the assignments, but failed to do so. While the A&P continued to occupy the property as tenants and respondents continued to manage the property and continued to remain the named insureds in the policy, the A&P properties were damaged by fire. Later respondents and the buyer rescinded the purchase agreement and the respondents returned to the buyer the purchase price, which exceeded the amount of the insurance.

Upon a claim being made by respondents, petitioner denied liability under its policy, on the ground that respondents' insurable interest in the properties terminated when title was transferred to the buyer.

In an action upon the policy the District Court entered judgment for petitioner, holding that respondents had no insurable interest in the properties at the time of the fire (A. 10-19; 404 F. Supp. 1076). On appeal the Court of Appeals held that under Illinois law respondents had an insurable interest and reversed and remanded (A. 1-8; 541 F. 2d 646). The Court reviewed at length the Illinois authorities and concluded, *inter alia:*

> 1. That under Illinois law, a named insured has an insurable interest in insured property if a pecuniary loss would be sustained by the insured because of the destruction of the property or a pecuniary benefit gained by its continued existence (A. 5).

> 2. That an insurable interest need not be an interest in the property itself (A. 4); and
>
> 3. That when respondents undertook the responsibility of obtaining a consent to the assignment of the policy from petitioner, but neglected to do so, respondents became liable to the buyer upon the subsequent destruction of the properties by fire, and thus had an insurable interest to the extent of their liability (A. 7).

The complaints set forth in the petition that the Court deliberately refused to apply Illinois law are wholly unjustified (See Pn. pp. 3, 4, 15, 18, 10). A mere reading of the Court's opinion demonstrates that it conscientiously interpreted Illinois law, and, moreover, did so correctly, as shown below.

REASONS FOR DENYING THE PETITION.

1.

The Petition Should Be Denied, Because It Presents No Question Worthy of Review by This Court.

The petition presents no question of law worthy of the certiorari jurisdiction of this Court. Under *Erie R. R.* v. *Tompkins*, 304 U. S. 64, the Court of Appeals was required to make a determination of whether respondents had insurable interest under Illinois law. Its opinion reveals that it undertook a careful and penetrating analysis of Illinois decisions bearing on this question. This Court does not exercise its certiorari jurisdiction to review routine determinations by the courts of appeal of state law.

Rule 19(1)(b) of this Court provides that the character of reasons which will be considered in governing review on certiorari include where a court of appeals has decided an *important* state or territorial question in a way *in conflict* with the applicable state or territorial law.

The question presented by the petition is important only to the litigants; no showing is made that the decision of the Court of Appeals *conflicts* with any decision of the Illinois Supreme Court or an Illinois Appellate Court. As shown below, the decision is entirely in accord with the decisions of the Illinois courts of review; and, certainly, it presents no question of public importance. This Court does not sit as a super court of appeals to review anew all questions of state law determined by the eleven courts of appeal. "[Certiorari] jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing" (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, "or for the benefit of the particular litigants" (*Rice* v. *Sioux. City Cemetery*, 349 U. S. 70, 74), but to decide issues, "the settlement of which is of importance to the public as distinguished from that of the parties" (*Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393).

The contention advanced by petitioner that the decision of the Eighth Circuit in *Lumbermens Mutual Ins. Co.* v. *Edmister*, 412 F. 2d 351 (C. A. 8, 1969), is in "*direct conflict*" with the opinion of the Seventh Circuit in this case (Pn. 22) is untenable. There is no conflict, but, even if there were, this fact would be completely irrelevant. The *Edmister* case was decided under Missouri law; the instant case was decided under Illinois law. In numerous areas of state law there are conflicts between the states, and the courts of appeal, in interpreting state law, necessarily will reflect such conflicts. Conflicts between courts of appeal are grounds for certiorari only in those areas of the law where the federal courts have the final voice. As said by this Court in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 206:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

In brief, the petition can be properly characterized as frivolous, and it was, in effect, so characterized by a judge of the Court of Appeals. When petitioner moved the Court of Appeals for a stay of mandate pending certiorari application, the Court entered an order, attached as Appendix A, which recites in part that petitioner's motion was denied because the Court was unable to determine "that the petition for writ of certiorari which will be filed on behalf of defendant-appellee will not be frivolous (see Circuit Rule 17), having in mind the standards which will govern the Supreme Court decision on whether to grant certiorari (see Supreme Court Rule 19)."

2.

Certiorari Should Be Denied Because the Decision of the Court of Appeals Correctly Interprets the Law of Illinois.

Petitioner's repeated complaint regarding the opinion of the Court of Appeals is bottomed upon the erroneous proposition that under the law of Illinois, in order to have an insurable interest, the interest "must be in the property itself" (Pn. 15, 16, 17). The Illinois Supreme Court has expressly rejected such a requirement. The leading case in Illinois on insurable interest is *Home Insurance Co.* v. *Mendenhall*, 164 Ill. 458, 463 (1897). In that case, the Court quotes approvingly from an authority that:

> " 'It is not necessary that the insured should have either a legal or equitable interest, *or indeed any property interest*, in the subject matter insured. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves *pecuniary loss to him or* those for whom he acts. *It need not be an existing jus in re nor jus ad rem.*' " (Italics added.)

The *Mendenhall* Court concluded for itself (p. 467):

> "It is enough if he [the insured] holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him. *It need not be*

an existing jus in re nor jus ad rem * * *" 164 Ill. at 467 (Italics added.)

A more recent case is *Beddow* v. *Hicks,* 303 Ill. App. 247, 258 (1940), where the Court said:

> "It has long been settled law in this State that a party has an insurable interest in property from the existence of which he receives a benefit or the destruction of which he will suffer pecuniary loss, *although he has no title to or possession of the premises.*"

The opinion of the Court of Appeals reviews many Illinois authorities where the Illinois courts of review have held that the insured had an insurable interest although he had no interest in the property itself (see A. 4, 5), and concluded that, if respondents *might* have suffered a loss by reason of the destruction of the property, they had an insurable interest. It went on to find, as already noted, that respondents' failure to perform their undertaking to forward the assignment and seek petitioner's consent, the breach of which made respondents liable to the buyer under Illinois law, furnished the requisite insurable interest and took the insurance contract out of being a wagering contract.

The petition is frivolous and further argument would serve only to dignify it. It should be denied.

Respectfully submitted,

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APPENDIX A.

Before

HON. PHILIP W. TONE, *Circuit Judge.*

W. WOOD PRINCE and JAMES F. DONOVAN, as Trustees of the Central Manufacturing District. *Plaintiffs-Appellants,* vs. ROYAL INDEMNITY COMPANY, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (73 C 3195)
No. 76-1061	

This matter comes before the court on the "Motion for Stay of Mandate" filed herein on September 28, 1976 by counsel for the defendant-appellee; the "Objections to Motion for Stay of Mandate" filed herein on September 29, 1976 by counsel for the plaintiffs-appellants; and the "Motion for Leave to File Certificate of Counsel in Response to Plaintiffs-Appellants' Objections to Motion for Stay of Mandate" filed herein on September 29, 1976 by counsel for the defendant-appellee. On consideration whereof,

IT IS ORDERED that leave is granted to file herein instanter the four copies of the defendant-appellee's tendered "Certificate of Counsel," which copies are presently lodged in the Office of the Clerk of this Court. Then, after a thorough consideration of all of the aforesaid documents, including the "Certificate of Counsel,"

IT IS ALSO ORDERED that the defendant-appellee's "Motion for Stay of Mandate" be, and the same is hereby, Denied because this Court is unable to determine that the petition for writ of certiorari which will be filed by the defendant-appellee will not be frivolous (see Circuit Rule 17), having in mind the standards which govern the Supreme Court's decision on whether or not to grant certiorari (see Supreme Court Rule 19).